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No. 82-134

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

TAXATION WITH REPRESENTATION OF WASHINGTON,

Cross-Appellant,

v.

DONALD T. REGAN, SECRETARY OF THE TREASURY, *et al.*,

Cross-Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF OF CROSS-APPELLANT

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Appellants/cross-appellees Donald T. Regan, *et al.* filed a jurisdictional statement (No. 81-2338) asking this Court to review the *en banc* decision of the United States Court of Appeals for the District of Columbia Circuit that section 501(c)(3) and related provisions of the Internal Revenue Code deny charities the equal protection of the laws. Appellee/cross-appellant Taxation with Representation of Washington ("Taxation") then filed this cross-appeal (No. 82-134) to assure that this Court, should it grant review as requested by the Government, will also have before it two questions which are closely related to that presented in the Government's jurisdictional statement: (1) what relief is appropriate if the court of appeals'

holding on equal protection is affirmed, and (2) whether the court of appeals erred in rejecting Taxation's alternative claim based on the First Amendment.

The Government's appeal was taken pursuant to 28 U.S.C. § 1252. Taxation's cross-appeal under section 1252 was timely filed pursuant to Rule 12.4 of the Rules of this Court. Nonetheless, the Government argues that the cross-appeal should be dismissed, not because it fails to present important, unresolved issues, but because in its view no appeal is proper in these circumstances. Because the Government ignores both the plain language of the statute and the purpose underlying it, its motion to dismiss should be denied.

1. Section 1252 provides that "[a]ny party" may appeal directly to this Court from a judgment of "any court of the United States . . . holding an Act of Congress unconstitutional in any civil action, suit, or proceeding to which the United States or any of its agencies, or any officer or employee thereof, as such officer or employee, is a party." The Government's appeal (No. 81-2338) is authorized by section 1252, since the court of appeals held that section 501(c) of the Internal Revenue Code is unconstitutional. *See Parker v. Levy*, 417 U.S. 733, 742 n.10 (1974).

2. The motion to dismiss argues that even though the appeal in this case may be taken under section 1252, the cross-appeal may not. However, section 1252 itself specifically directs that once a section 1252 appeal is taken by any party, all other appeals must be taken to this Court;

> A party who has received notice of appeal under this section shall take any subsequent appeal or cross appeal to the Supreme Court. All appeals or cross appeals taken to other courts

> prior to such notice shall be treated as taken directly to the Supreme Court.

The Government recognizes that Congress intended by this paragraph to ensure that a single case was not divided between two courts, but maintains that it did not expand the right of appeal of a party not otherwise eligible to invoke section 1252 jurisdiction. Thus, according to the Government, Taxation's remedy is in the Supreme Court, but only by way of certiorari, not through a cross-appeal. In taking that position, it emphasizes that Taxation has already had one appeal (to the D.C. Circuit) and it asserts that the cross-appeal contemplated by section 1252 is limited to appeals from district courts, not from courts of appeals.

The principal difficulty with this position is that it has no support in the language of section 1252. That provision speaks in terms of "[a]ll appeals or cross appeals" and makes no mention of petitions for writs of certiorari. No decision of this Court, nor any other authority, suggests that the certiorari process has the remotest connection with cases in which the basis for jurisdiction in this Court is by an appeal. Under these circumstances it would be unreasonable to read section 1252, whose purpose is to keep an entire case in a single court, *United States v. Raines*, 362 U.S. 17, 27 n.7 (1960), to differentiate the methods by which the parts of that case reach this Court, absent any hint that Congress desired such a result. *See McLucas v. DeChamplain*, 421 U.S. 21, 31 (1975).

Besides ignoring the language and frustrating the purpose of section 1252, the theory underlying the Government's motion to dismiss would undermine one of the significant improvements brought about by the new Rules adopted by this Court in 1980. Under the prior Rules, there was no separate procedure for taking a cross-appeal

or filing a cross-petition for a writ of certiorari. Thus, the party which prevailed below was often forced to file its own jurisdictional statement or petition before it knew whether its opponent would seek review in this Court, or if so, what questions would be presented. *See generally* R. Stern & E. Gressman, *Supreme Court Practice* § 6.34, at 481-86 (5th ed. 1978). Under new Rule 12.4, there exists an efficient procedure of appeal and cross-appeal, which eliminates the filing of unnecessary jurisdictional statements with this Court. *See also* Rules 19.5, 20.5 (cross-petition for writ of certiorari). If the Government's interpretation of section 1252 were to be adopted, appeals under section 1252 would once again call for the filing of protective petitions for certiorari or jurisdictional statements by parties which prevailed below. Thus, these documents would have to be printed and filed, and the fees paid, but many of them would later be withdrawn as unnecessary. The improvements brought about by the 1980 Rules should not be disregarded in appeals under section 1252.

3. Apart from its technical assertion that a cross-appeal may not be taken to this Court under section 1252, the Government does not question that the issues raised by Taxation on cross-appeal are appropriate for review by this Court. Thus, it has not made a motion to affirm the portions of the judgment which are challenged by Taxation, and such a motion would not be appropriate here since it is proper only if "it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument." S. Ct. Rule 16.1(c).

4. Ordinarily, if a party files a jurisdictional statement where the proper form of review is by petition for a writ of certiorari, this Court considers the case as if a petition for

a writ of certiorari had been filed. 28 U.S.C. § 2103. The Government takes the position that if Taxation has no right of cross-appeal in this case under 28 U.S.C. § 1252, and the jurisdictional statement is therefore considered as a petition for a writ of certiorari, it should be dismissed as untimely. Although the Rules governing appeals and those regulating petitions for writs of certiorari specify procedures for cross-appeals and cross-petitions which are virtually identical, there is no Rule specifically authorizing additional time to file a cross-petition for a writ of certiorari in response to a jurisdictional statement. The cross-appeal in this case, if considered as a petition for a writ of certiorari, should nonetheless be granted.

There is nothing in the Rules to suggest that the availability of the new procedure of cross-petition should not be available in those cases in which it is this Court's appellate jurisdiction which is invoked, rather than its discretionary jurisdiction. In this, as in any case which comes to this Court by way of a court of appeals, the Government could have sought a writ of certiorari rather than taking an appeal, and if it had done so, a cross-petition by Taxation plainly would have been proper. The highly technical interpretation of the Rules advanced by the Government, which would authorize a cross-petition *only* when the certiorari procedure is used by the opposing party to seek review, would frustrate rather than advance the intent of the new Rules adopted in 1980. *See* pages 3-4 *supra*. The Government also fails to recognize that under 28 U.S.C. § 2101(c) this Court has the authority to extend the time for applying for a writ of certiorari by 60 days. The Court therefore has jurisdiction over the cross-appeal in this case since it was filed well within 150 days after entry of the judgment below.

5. In arguing that the questions raised by Taxation are not worthy of this Court's consideration, the Government

does not even discuss the first question presented on the cross-appeal – the remedy which should be chosen to cure the constitutional defect found by the court of appeals. For the reasons more fully stated in Taxation's jurisdictional statement at pages 6-9, this Court should adhere to its consistent practice of deciding on an appropriate remedy as a part of its adjudication of an equal protection claim.

As to Taxation's First Amendment argument, the Government asserts that it "is answered fully by this Court's decision in *Cammarano* v. *United States,* 358 U.S. 498, 512-13 (1959)." Motion to Dismiss at 5. However, all ten of the judges on the court of appeals who considered this case agreed that *Cammarano* is not dispositive. Both the majority and the dissent found it necessary to go far beyond a citation to *Cammarano* in analyzing the First Amendment issue, particularly since the policy of "neutrality" toward lobbying which was said to underlie *Cammarano* was eliminated by Congress in 1962. *See* 46a & n.29; 63a-64a. Because section 501(c)(3) singles out a certain type of speech (lobbying) for unfavorable treatment, it raises serious First Amendment questions which were never addressed, let alone decided, in *Cammarano. See Consolidated Edison Co. v. Public Service Comm'n,* 447 U.S. 530, 537-38 (1980); *Carey v. Brown,* 447 U.S. 455, 462 n.6 (1980). *See also* 87a-106a (dissenters' discussion of the First Amendment claim).

The Government concedes that the lobbying limitations of sections 501(c)(3) and 170(c)(2) of the Internal Revenue Code disqualify a charity like Taxation, which engages in substantial lobbying, from receiving *any* contributions which are tax-deductible to donors. Motion to Dismiss at 6. The Government also concedes that *Cammarano* involved only the question of deductibility of the particular funds spent on lobbying. *Id.* Yet its only response to Taxa-

tion's argument that there is a gross imbalance between the lobbying activity undertaken by a charity and the disastrous tax consquences suffered by it is the bald assertion that the "limitations are no broader than necessary to accomplish the underlying congressional purpose." Motion to Dismiss at 6.

The Government's citations to *Slee v. Commissioner*, 42 F.2d 184 (2d Cir. 1930), and *Better Business Bureau v. United States*, 326 U.S. 279 (1945), are also inapposite. Although an organization qualifying for a tax exemption under section 501(c)(3) must be organized and operated exclusively for exempt purposes, lobbying in furtherance of charitable purposes constitutes a charitable activity. *See* Taxation's Jurisdictional Statement at 13 n.4. The Government's suggestion that lobbying is *per se* improper or undesirable is contradicted both by section 162 (e) of the Code (which allows deductions for almost all business-related lobbying) and by section 501(h) of the Code (which specifically authorizes charities which elect to be covered by the statute to lobby up to certain specified ceilings). Like pamphleteering, litigation, and other forms of speech, lobbying in support of charitable purposes is an activity protected by the First Amendment, and one which can be restricted only upon a compelling showing of governmental need. No such compelling governmental interest has been identified, much less proven, and therefore a significant constitutional question has been raised concerning the tax code's restrictions on lobbying by charities.

CONCLUSION

The motion to dismiss should be denied. If review is granted in No. 81-2338, the questions raised by the cross-appeal should also be given plenary consideration by this Court.

Respectfully submitted,

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